

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK JASON TOLBERT,

Defendant-Appellant.

UNPUBLISHED

September 14, 2004

No. 246009

Wayne Circuit Court

LC No. 02-004778

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of felon in possession of a firearm, MCL 750.224f. The jury acquitted him of two counts of first-degree premeditated murder and one count of possession of a firearm during the commission of a felony. The trial court sentenced him, as a fourth habitual offender, MCL 769.12, to a prison term of fifteen to thirty years. We affirm.

I

Defendant challenges the trial court's upward departure from the sentencing guidelines minimum sentence range of twenty-four to seventy-six months for felon in possession of a firearm.

Under the statutory sentencing guidelines, a departure from the prescribed guidelines range is only allowed if there is a substantial and compelling reason to do so. MCL 769.34; *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003). A substantial and compelling reason for departure must be objective and verifiable, must "keenly" or "irresistibly" grab the appellate court's attention, and must be of "considerable worth" in deciding the length of a sentence. *Babcock*, *supra* at 257-258. On review, the existence of a particular factor articulated in support of a departure is reviewed for clear error, the determination whether a factor is objective and verifiable is reviewed as a matter of law, and a trial court's determination that the objective and verifiable factors in a particular case constitute substantial and compelling reasons to depart from the guidelines is reviewed for an abuse of discretion. *Id.* at 264-265. In this context, a trial court abuses its discretion if it chooses an outcome that is outside the range of reasonable and principled outcomes. *Id.* at 269. Here, we conclude that defendant has not established that he is entitled to relief with regard to his sentence.

As an initial matter, defendant's argument that the trial court failed to prepare a written departure evaluation is not supported by the record. Rather, the lower court file contains a copy of the written departure evaluation form prepared by the court.

Defendant also asserts that his prior criminal record did not constitute a proper basis for departing from the sentencing guidelines range. However, the trial court's remarks do not reflect that it departed from the guidelines based simply on defendant's prior record. Rather, the record discloses that the trial court's departure decision was based principally on its determination that a preponderance of the evidence at trial established that defendant killed the two homicide victims, with some additional consideration given to defendant's prior record. That defendant's prior record, standing alone, might not have supported an upward departure from the guidelines does not mean that it could not properly be considered as an objective and verifiable factor that, in combination with other factors, would provide a substantial and compelling reason to depart from the guidelines range.

At the heart of this matter, defendant argues that the trial court erred by determining, for sentencing purposes, that he was involved in murdering the two victims, notwithstanding that a jury acquitted him of the charged murders. We disagree.

In *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998), this Court stated that, while a trial court may not make an independent finding of guilt and sentence a defendant on the basis of that finding, it "may consider the evidence offered at trial . . . including other criminal activities established even though the defendant was acquitted of the charges[.]" In *Compagnari*, the defendant was convicted of larceny in a building and of being an accessory after the fact; the convictions arose from an incident in which a person was killed by strangulation during the course of the larceny, but the defendant was acquitted of first-degree murder. *Id.* at 234. With regard to the trial court's consideration of the defendant's involvement in the victim's death as a factor in sentencing the defendant, this Court stated:

Among other things, the evidence at trial here suggested that defendant had concurred, or at the very least acquiesced, in the judgment of his accomplice that the victim should be killed because she had seen the accomplice's face. The trial court properly, in our judgment, considered evidence that a victim had been killed during the course of a serious felony in her home committed by defendant and a codefendant. [*Id.* at 236.]

Thus, in appropriate circumstances, a trial court may consider evidence that a defendant bore responsibility for a killing as an aggravating factor in sentencing, even if the defendant was acquitted of a murder charge based on the killing. Thus, notwithstanding defendant's acquittal of the murder charges, the trial court was not precluded from considering the evidence presented at trial as establishing by a preponderance of the evidence for sentencing purposes that defendant killed the homicide victims.

Defendant also argues that there was not a substantial and compelling reason for the trial court to depart upward from the sentencing guidelines. We disagree. There was objective and verifiable evidence to support the trial court's finding that a preponderance of the evidence established defendant's culpability in the killing of the homicide victims, particularly the DNA evidence reflecting that blood of one of the victims was found on a pair of pants that contained

defendant's DNA, as well as defendant's testimony in which he admitted that he was in close proximity to the victims and was in possession of a firearm immediately before the shootings. Furthermore, such evidence "keenly" or "irresistibly" grabs our attention, and it is of considerable worth in determining an appropriate sentence, all the more so when considered in light of defendant's prior criminal record. Thus, the trial court did not abuse its discretion in deciding to depart upward from the sentencing guidelines range.

We also conclude that the extent of the departure was not an abuse of discretion in light of the circumstances of this offense, which involved the violent shooting deaths of two individuals, and in light of defendant's serious prior criminal record (five prior felonies and a juvenile record). See also *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997) ("a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society").

II

Defendant argues that the trial court abused its discretion, *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003), by denying his motion for a continuance after defense counsel received reports of certain DNA testing for the first time on the day trial began.

Even assuming that defendant showed good cause and due diligence to support his request for a continuance, a trial court's denial of a request for a continuance "is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion." *Id.* at 18-19. Here, defendant was acquitted of the two first-degree murder charges to which the DNA evidence was relevant. Further, and more significantly, the record fails to disclose that defendant moved for a new trial based on the denial of the continuance and, accordingly, never presented evidence that, if a continuance had been granted, he could have presented expert testimony or any other evidence that would have called the prosecution's DNA evidence into serious question. Thus, defendant has not established any prejudice from the denial of the continuance, because he has not shown that he could have rebutted the DNA evidence that he describes as having "forced" him to testify at trial.

Nor has defendant established a violation of his constitutional right to due process from the denial of a continuance. Contrary to what defendant suggests, there "is no general constitutional right to discovery in a criminal case." *People v Elston*, 462 Mich 751, 765-766; 614 NW2d 595 (2000). Further, this Court has indicated that a criminal defendant's due process right to discovery is implicated only with regard to evidence that is favorable to the defendant, exculpatory, or known by the prosecution to be false. *People v Tracey*, 221 Mich App 321, 324-325; 561 NW2d 133 (1997). As defendant effectively acknowledges in arguing that the DNA evidence was harmful to his case, it was not favorable to him or exculpatory. Also, there is no indication that any of the DNA evidence was known by the prosecution to be false. Thus, there was no violation of defendant's constitutional right to due process with regard to the time of the disclosure of that evidence. Therefore, any error in failing to grant a continuance to remedy a nonconstitutional discovery violation is nonconstitutional in nature. *Elston, supra* at 765-766. It follows that, in this case, in which there was either no discovery violation or, at most, a nonconstitutional discovery violation, there was no violation of defendant's constitutional right

to due process based on the trial court's failure to grant the request for a continuance premised on the timing of the disclosure of the DNA evidence.

The preceding analysis – that defendant did not have a constitutional right to pretrial discovery of the DNA evidence – arguably is a sufficient basis on which to reject his argument that the trial court's failure to grant a continuance denied him the effective assistance of counsel. In any event, to establish ineffective assistance of counsel, a defendant must show a reasonable probability of a different outcome but for counsel's deficient performance. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). In light of defendant's failure to develop an evidentiary record below, he has not established a reasonable probability of a different outcome if a continuance had been granted.

Lastly, defendant suggests that if he is not granted a new trial based on this issue, then he should receive an evidentiary hearing. However, defendant never filed a motion in this Court requesting a remand for such an evidentiary hearing. See MCR 7.211(C)(1)(a)(ii) (allowing an appellant to file a motion to remand within the time provided for filing the appellant's brief if "development of a factual record is required for appellate consideration of the issue"). Given defendant's failure to move properly for a remand, he is not entitled to a remand at this point.

III

Defendant next argues that the trial court erroneously denied his request to exclude testimony from an interrogating police officer that indicated that defendant initially refused to disclose information about his whereabouts on the night in question. We disagree. In considering a trial court's denial of a request to suppress a statement based on a violation of the right to remain silent, this Court reviews the record de novo but reviews the trial court's factual findings for clear error. *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001). Contrary to defendant's position, the admission of substantive evidence of a defendant's "demeanor and statements made during custodial interrogation after a valid waiver of his Fifth Amendment privilege against compelled self-incrimination and prior to invoking the right to remain silent is neither error of constitutional dimension nor a violation of the Michigan Rules of Evidence." *People v McReavy*, 436 Mich 197, 203; 462 NW2d 1 (1990). The record indicates that, after defendant waived his right to remain silent, he merely refused to answer a particular question or, considering the testimony in context, that he merely refused to answer the question in writing. Defendant has not established any error with regard to the admission of the challenged testimony, which concerned a statement made after a valid waiver of the privilege against compelled self-incrimination and before defendant invoked the right to remain silent.

IV

Defendant asserts that the prosecutor engaged in misconduct by eliciting from a police officer testimony that defendant had been in jail. Defendant did not preserve this issue with an appropriate objection below that specified the same grounds for objection that he now raises on appeal. To avoid forfeiture of an unpreserved claim of error in a criminal case, defendant has the burden of establishing a plain error that affected substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003) (nonconstitutional error); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (constitutional error).

We conclude that defendant has not established any plain error based on this issue. Defendant's argument gives the impression that the prosecutor elicited testimony about defendant having been in jail merely to impugn his character gratuitously. Actually, however, the police officer indicated in this testimony that he believed defendant was incarcerated at the Wayne County Jail when he went there with a search warrant to obtain a sample of defendant's blood. When the officer went to the cubicle where defendant was supposed to be located, he discovered a man wearing a wristband with defendant's name who identified himself as defendant. However, when the officer told the man that he was not defendant, the man told the officer that he was defendant's "little brother" and that "they let [defendant] go." The evidence was offered to suggest that defendant had managed to be inappropriately released from jail and to have another man act as his imposter in an effort to provide a false blood sample. This evidence was relevant to defendant's consciousness of guilt because it showed a deliberate effort to avoid detection by preventing defendant's blood from being matched to pertinent physical evidence. Accordingly, because the prosecutor had a good-faith basis for introducing this evidence, even though it also incidentally indicated that defendant had been in jail, defendant has not established plain error. See *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003) (good-faith effort by prosecutor to admit evidence does not constitute misconduct).

V

Defendant argues that the trial court improperly admitted other-acts evidence regarding his involvement in drug dealing and possession of guns. Defendant preserved his objection to the relevancy of the testimony about his involvement in drug dealing by objecting on that ground below. However, he did not preserve his arguments that the drug or gun-related evidence was inadmissible under MRE 404(b), because he did not object on that ground below. See *People v Bulmer*, 256 Mich App 33, 34-35; 662 NW2d 117 (2003) (objection based on one ground is insufficient to preserve an appellate attack based on a different ground).

With regard to the only aspect of this issue that is preserved, it is apparent that any error arising from the prosecutor's cross-examination of defendant about his involvement in drug dealing and his reply that he sold "crack" does not warrant relief because it was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt of being a felon in possession of a firearm and, accordingly, does not warrant relief under the lesser standard applicable to a claim of nonconstitutional error. See *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001) (nonconstitutional error in admission of evidence does not require reversal unless it affirmatively appears more probable than not that the error was outcome-determinative).¹ In this regard, defendant's own direct examination testimony and stipulation that he had been previously convicted of a felony and that he possessed a firearm at a time when he had not regained his eligibility to do so constituted overwhelming proof of his guilt. For this same reason, we conclude that any error arising from the admission of evidence of defendant's prior possession of guns or involvement in drug dealing did not affect his substantial rights.

¹ Although defendant's statement of the question pertaining to this issue indicates that defendant's constitutional due process rights are implicated, his arguments only raise questions of nonconstitutional error.

Jones, supra at 355; *Carines, supra* at 763-764. Indeed, it is apparent that defendant was not prejudiced by this evidence in light of the jury's decision acquitting him of the more serious first-degree murder charges.

VI

Defendant claims that the prosecutor denied him a fair trial by cross-examining him with regard to his use of aliases. Defendant did not object to this questioning below and, therefore, did not preserve this issue. Again, any error in this regard does not warrant relief because it did not affect defendant's substantial rights, *Jones, supra* at 355; *Carines, supra* at 763-764, in light of the overwhelming evidence of defendant's guilt of the only offense of which he was convicted, felon in possession of a firearm, based on his direct examination testimony and the stipulation previously discussed.

VII

Finally, defendant argues that this Court should remand this case for an evidentiary hearing with regard to the trial court's denial of his motion to suppress certain evidence seized by the police. However, we conclude that defendant is not entitled to a remand because he failed to file an appropriate motion to remand in this Court. MCR 7.211(C)(1)(a) provides that "[w]ithin the time provided for filing the appellant's brief, the appellant may move to remand to the trial court." It was defendant's obligation to seek to create an evidentiary record regarding the underlying search and seizure issue before this Court's consideration of his appeal on the merits. As the appellant, "defendant [bears] the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal [is] predicated." *Elston, supra* at 762. We conclude that defendant is not entitled to a remand for an evidentiary hearing at this point because he failed to fulfill his burden, as the appellant, to file a timely and appropriate motion in this Court requesting a remand for an evidentiary hearing on the search and seizure issue.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter